Indiana Department of Education

Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

QUARTERLY REPORT

October – December: 2004

The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at <kmcdowel@doe.state.in.us>.

In this report:

THE "PARENT" IN THE UNCONVENTIONAL FAMILY

One of the increasingly difficult threshold decisions that has to be made by any number of governmental entities–especially local educational agencies and State educational agencies–is who is the "parent" of a child. Who has the rights, duties, responsibilities, and obligations with respect to a child? With the fluid nature of "family," it is not always apparent who the "parent" is. Even the U.S. Supreme Court has acknowledged this difficulty. See Troxel v. Granville, 530 U.S. 57, 63, 120 S. Ct. 2054, 2059 (2000) ("The demographic changes of the past century make it difficult to speak of an average American family.").

There has been rather intense media coverage of various legal and legislative initiatives to ban, restrict, authorize, legalize, or legitimize same-sex civil unions or marriages. While media coverage has centered on legal and legislative maneuvers, there has been a growing body of law addressing the dissolution of families with same-sex partners and the unusual problems attendant to such family arrangements. Oftentimes, one is the biological or adoptive parent; the partner is neither. What will be the relationship post-dissolution, and how will this affect such matters as: school attendance; parental permission (including informed parental consent for services under the Individuals with Disabilities Education Act as well as the right to participate in developing a child's Individualized Education Program or IEP); access to educational records; right to access to progress reports, including report cards; and right to receive notices generally? Who is and who is not the "parent" of the child?

Indiana Addresses The Issue

On November 24, 2004, the Indiana Court of Appeals wrestled with this issue. In In Re: The Parentage of A.B., 818 N.E.2d 126 (Ind. App. 2004), the court was asked to determine whether Dawn King was entitled to be known as the "parent" of A.B., a move opposed by A.B.'s biological mother, Stephanie Benham. Dawn and Stephanie began a domestic relationship in 1993. They shared joint finances and other obligations and held themselves out as "a couple in a committed, loving relationship." They "even participated in a commitment ceremony at which they proclaimed themselves to be committed domestic partners before family and friends." 818 N.E.2d at 127.

Dawn and Stephanie decided "to bear and raise a child together." It was decided Stephanie would bear the child. Dawn's brother agreed to be the semen donor through artificial insemination. This would ensure the resulting child would be genetically related to both Dawn and Stephanie. Id. at 128. Dawn and Stephanie intended "to be co-parents of the resulting child, assuming equal parental roles in the child's care and support." A.B. was born on May 15, 1999. Following A.B.'s birth, Dawn–with Stephanie's consent–filed a co-parent petition to adopt A.B. While the adoption was pending, Dawn and Stephanie separated, and Stephanie withdrew her consent to the adoption. During this brief separation, Dawn paid child support and had regular visitation with A.B. The couple reconciled and "resumed living together as a family." However, the adoption process was not pursued any further. Id.

In January of 2002, the relationship ended. Dawn continued to pay monthly child support and have regular visitation with A.B. until July of 2003, when Stephanie unilaterally terminated Dawn's visitation and rejected Dawn's support payments. Id.

There was no dispute that from A.B.'s birth in 1999 until July of 2003, Dawn and Stephanie acted as co-parents of A.B., providing financial and emotional support for the child. Both held out to the public that A.B. was their daughter. A.B. referred to Dawn and Stephanie as mother. Stephanie encouraged the formation of a parent-child relationship between A.B. and Dawn. Id.

Dawn then sought a declaration from the court that she should be recognized as A.B.'s legal second parent with all the rights and obligations of a biological parent. Dawn also argued that, should she not be considered A.B.'s parent, the court should recognize that Dawn has acted *in loco parentis* in a custodial and parental capacity, thus entitling her to at least visitation rights. Stephanie opposed Dawn's action and moved to dismiss. The trial court, "with apparent reluctance," dismissed Dawn's claim for failure to state a claim. Id.

The trial court noted that it "was sympathetic to the nature of Dawn's claim, particularly in light of the apparent bonding between A.B. and her during the tenure of Dawn's relationship," but Indiana law has not extended "some form of recognition to gay and lesbian relationships to create a structure within which a myriad of legal issues emanating from such partnerships may be resolved," as has occurred "with unmarried heterosexual couples." Id. at 128-29.

"[I]t is sufficient to note that Dawn has no relationship to A.B. within the context of any relationship presently given legal recognition by the State of Indiana that might permit her to claim parentage of A.B.," the trial court found. Id. at 129. At present, the trial court added, Indiana recognizes four (4) sources of parentage: (1) children resulting from heterosexual marriages; (2) children resulting from biological paternity; (3) children resulting from "the limited circumstance of children conceived by artificial fertilization within a marital relationship with the assistance of any anonymous semen donor"; and (4) children who are adopted. Id.

"Only adoption has provided a vehicle by which gay-lesbian couples in Indiana who wish to co-parent children may avoid public policy issues and biologically-related sub-issues related to same-sex relationships," the trial court added. Id. However, Dawn did not pursue adoption of A.B. The trial court determined that it could not grant the relief Dawn sought because it would require the court to create a relationship "for which there is no statutory or judicial authority in the State of Indiana." Id.

Dawn appealed to the Indiana Court of Appeals, which reversed the trial court's decision. Judge Ezra H. Friedlander, writing for a unanimous three-member panel, summarized Dawn's position as follows:

> [Dawn] claims that when a committed same-sex couple makes a joint decision to bear a child through artificial insemination and raise the child together as co-parents, Indiana law should protect the relationship between the child and her second parent

> in the same manner it protects the relationship between a nonbiological parent and his child born within the marriage under similar circumstances.

Id. at 130. The appellate court referred to a decision by the Indiana Supreme Court in Levin v. Levin, 645 N.E.2d 601 (Ind. 1994), where the court was asked to decide whether a husband who consented to the artificial insemination of his wife was the legal father of the resulting child. In Levin, it was the father's wish that his wife undergo artificial insemination. He consented orally and in writing to the process. He held the child out as his own for fifteen years. He did not object to declaring the child as his own when the marriage was dissolved and he was ordered to pay support. The Supreme Court found that Levin was equitably estopped from denying his child support obligation as he was legally responsible for the child. Levin, 645 N.E.2d at 603-05.

The Court of Appeals noted that the Supreme Court's analysis in Levin did "not expressly hinge on the marital status of the parties" and would be "equally applicable to the case at hand." 818 N.E.2d at 131. The appellate court could find "no legitimate reason...to provide children born to lesbian parents through the use of reproductive technology with less security and protection than that given to children born to heterosexual parents through artificial insemination." Id. (internal punctuation omitted).

> [W]e cannot close our eyes to the legal and social needs of our society; the strength and genius of the common law lies in its ability to adapt to the changing needs of the society it governs. [Citations omitted.]
>
> Our paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and protect the rights of children raised in these families, usually upon their dissolution. At that point, courts are left to vindicate the public interest in the children's financial support and emotional well-being by developing theories of parenthood, so that "legal strangers" who are *de facto* parents may be awarded custody or visitation or reached for support. Case law and commentary on the subject detail the years of litigation spent in settling these difficult issues while the children remain in limbo, sometimes denied the affection of a "parent" who has been with them from birth.

Id., citing to Adoption of K.S.P., 804 N.Ed2d 1253, 1259 (Ind. App. 2004) and Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993).

The Court of Appeals was aware of the fine line it was walking between "judicial activism" and legislative inaction.

> We encourage the Indiana legislature to help us address this current social reality by enacting laws to protect children who, through no choice of their own, find

> themselves born into unconventional familial settings. Until the legislature enters this arena, however, we are left to fashion the common law to define, declare, and protect the rights of these children. *See* Ind. Constitution. art. I, § 12 (providing in part, "all courts shall be open; and every person, for injury done to him...shall have remedy by due course of law"). We, therefore, hold that when two women involved in a domestic relationship agree to bear and raise a child together by artificial insemination of one of the partners with donor semen, both women are the legal parents of the resulting child.

Id. at 131-32. In support of its determination, the court observed that A.B. would not have been born had Dawn and Stephanie not agreed to be co-parents. Additionally, Dawn and her brother, who acted as the semen donor, "relied in good faith on Stephanie's representations" that Dawn and Stephanie would be the parents of the resulting child. Through reproductive technology, Dawn and Stephanie "engaged in a nontraditional procreative act" resulting in a child "who is genetically related to both women." They raised the child together, providing financial and emotional support. Dawn continued to provide support and participate in the parenting of A.B. even when Dawn's relationship with Stephanie ended. Id. at 132.

The appellate court was not persuaded by Stephanie's argument that, as the biological parent, any rights provided to Dawn "would violate [Stephanie's] constitutional right to make decisions concerning the custody and control of her daughter." Id. The court did not dispute that parents have a fundamental right to make decisions concerning the care, custody, and control of their children. However, in this case, "we have determined that both Stephanie and Dawn are the legal parents of A.B. and stand on equal footing with respect to the child." Id. Stephanie's agreements to bear and raise a child with Dawn, to foster a parental relationship between Dawn and A.B., and to hold out A.B. as the child of her relationship with Dawn "waived the right to unilaterally sever that relationship when her romantic relationship with Dawn ended." Id.

The trial court's decision was reversed. The matter was remanded to the trial court for any further proceedings.[1]

The "Parent" Issue In Other States

Colorado

In the Interest of E.L.M.C., a Child, and Concerning Cheryl Ann Clark and Elsey Maxwell McLeod, 100 P.3d 546 (Colo. App. 2004) is also a recent case of this genre.[2] This is an appeal from a trial

[1]The dispute is far from over. A Motion for Rehearing and Motion for Transfer to the Indiana Supreme Court have both been filed. In addition, several parties have petitioned to intervene as amicus curiae, including the State of Indiana.

[2]The Colorado Court of Appeals' decision references other cases that are similar in respects to this one. See E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999), where child visitation was awarded to a *de facto* parent in a same-sex relationship where the couple planned a pregnancy together, supported each

court's order awarding joint parental responsibilities, except for decisions regarding religion and dental care, to Elsey Maxwell McLeod, Cheryl Ann Clark's former domestic partner. Clark, the adoptive parent, also appealed the trial court's order prohibiting her from exposing E.L.M.C. to "religious upbringing or teaching...that can be considered homophobic." 100 P.3d at 548.

The appellate court at the outset noted the increasing difficulty for courts to address such issues. Quoting N.A.H. v. S.L.S., 9 P.3d 354, 359 (Colo. 2000), the court observed:

> Parenthood in our complex society comprises much more than biological ties, and litigants increasingly are asking courts to address issues that involve delicate balances between traditional expectations and current realities.

Id. Clark and McLeod lived together for eleven years. They jointly owned a home. They had a commitment ceremony and discussed having a child through *in vitro* fertilization or by adoption. Clark sought out adoption opportunities in China. When it was discovered that China would not permit adoption by a same-sex couple, Clark completed the paperwork as the adoptive parent. Clark and McLeod traveled together to China where Clark adopted the child, E.L.M.C., who was then six months old. Clark and McLeod sent out an "arrival announcement" where, in part, they wrote that E.L.M.C. "Now lives with two adoring moms." They filed a joint "Petition for Custody" with Clark as the parent and McLeod as the non-parent, indicating the intent for E.L.M.C. to be raised by Clark and McLeod "as one family with two parents." E.L.M.C. came to regard both as parents, referring to McLeod as "mommy" and Clark as "momma." Clark also petitioned to change the child's name to include McLeod's name "to acknowledge an important family member..." Both women were listed as mothers of the child in the school directory. Id. at 549-550.

But the relationship soured and eventually fractured in 2001. Subsequently, Clark sought to restrict McLeod's parenting opportunities with E.L.M.C. McLeod sought equal parenting time. The dispute eventually resulted in the trial court orders referenced *supra*, wherein McLeod was recognized as the child's "psychological parent," a concept somewhat related to "*de facto* parent" employed by other courts to describe a person who is neither the biological nor adoptive parent of a child but has served as the child's parent for all intents and purposes.

The Colorado appellate court upheld the trial court's orders with respect to McLeod's rights, but reversed and remanded the limitation on Clark's rights to direct the upbringing of E.L.M.C., specifically with regard to religious training. The appellate court's detailed opinion includes references to cases from many other States, with representative cases from every region of the country.

---

other through the pregnancy and childbirth, gave the child both of their last names, and raised the child as their own, expressing publicly that the child had two mothers. Also see V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000), where same-sex partner of the biological mother had assumed a parental role in raising the biological mother's child such that a "psychological parenthood" had been established and such person could petition for custody and visitation; and In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wisc. 1995), discussed *infra*.

The court had to wrestle with that state's "best interests of the child" standard to ensure that trial courts did not decide what was better for a child absent any showing of harm (physical or emotional) or threat to the child's well being. As a preliminary matter, the court agreed that the "fact that E.L.M.C.'s psychological parent is the same gender as her adoptive parent" is irrelevant in this context. "The ability to marry the biological parent and ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed parental status and discharged parental duties." Id. at 551 (citation omitted).

The plurality opinion in Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000), a case involving grandparent visitation that interfered with a parent's right to direct the upbringing of her children, seemed to indicate that "statutory interference with the constitutional rights of a fit, legal parent should be subjected to strict scrutiny." Id. Justice Sandra Day O'Connor wrote that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Troxel, 530 U.S. at 66, 120 S. Ct. at 2060. This right "inheres a presumption a fit parent will act in the best interests of his or her child." There were no "special factors" that would justify the state's interference with this fundamental right of a parent: (1) Parental unfitness was not alleged;[3] (2) the Court below gave no special weight to the parent's determination of what was in her children's best interests; and (3) the parent had not sought to eliminate grandparent visitation entirely, but only to restrict it. 100 P.3d at 551-52.

To establish that one is a "psychological parent" does not require the nonparent to "have a legal relationship to the parent or the minor child." Colorado law indicates that any nonparent may commence parental responsibility proceedings so long as the nonparent had physical care of the child for at least six months. This may include friends, relatives, grandparents, step-parents or anyone else other than the child's natural parent.[4] For application of the "psychological parent doctrine," Colorado law "turns not on the nature of the legal relationships among the parties, but on the quality of the relationship between the nonparent and the child." Id. at 554. The court also rejected Clark's arguments that McLeod's petition could only be incidental to a dissolution proceeding or that McLeod would have had to have had "exclusive physical care" of E.L.M.C. for the six-month period found in Colorado law. The court noted that statute does not qualify the six-month physical care requirement to be "exclusive." Id. at 554-55. The court also rejected Clark's argument that before any parental responsibilities could have been ordered in McLeod's favor, there would have to be a showing that Clark was somehow unfit as a parent. The appellate court noted that McLeod was the child's "psychological parent" nearly from E.L.M.C.'s birth, a relationship that Clark not only consented to but encouraged. E.L.M.C. recognizes both as her parents, such that

---

[3]"[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State" to interfere with the parent's ability "to make the best decisions concerning the rearing of that parent's children." Id. at 552, quoting in part from Troxel, 530 U.S. at 68-69, 120 S. Ct. at 2061.

[4]In many states, this concept is defined judicially (or statutorily) as *in loco parentis*.

excessive restriction or termination of McLeod's visitation rights would result in "emotional harm" to E.L.M.C. Id. at 555-56.

As noted *supra*, the U.S. Supreme Court did not detail what "special factors" would permit State interference in the parent-child relationship. However, there is a sufficient body of law to indicate that a State, acting pursuant to its interest as *parens patriae*, may exercise such authority to guard children against imminent harm. *Physical* harm is not the only compelling state interest; hence, there are laws that regulate the family regarding such matters as compulsory school attendance and child labor. In short, the State's interest is in the well-being of children, which can include a child's physical, mental, or emotional well-being. "[U]nder certain circumstances, even the existence of a developed biological parent-child relationship will not prevent nonparents from acquiring parental rights vis-a-vis the child." Id. at 556.

> [W]e...conclude that, consistent with existing federal limitations on a parent's fundamental right to direct the upbringing of the child, proof that a fit parent's exercise of parental responsibilities poses actual or threatened emotional harm to the child establishes a compelling state interest sufficient to permit state interference with parental rights. Hence, we do not determine whether a showing of actual or threatened emotional harm is necessary in every case to establish such a compelling state interest.

Id. at 558. For a nonparent to be a "psychological parent" or *de facto* parent, there would have to be some factors for consideration by a court. Irrespective of the descriptor used, any nonparent seeking to receive parental responsibilities would have to have "a relationship with deep emotional bonds such that the child recognizes the person, independent of the legal form of the relationship, as a parent from whom they receive daily guidance and nurturance." Id. at 559. The Colorado court cited with favor a four-factor test employed by the Wisconsin Supreme Court in In the Custody of H.S.H.-K., 533 N.W.2d 419 (Wisc. 1995):

- The legal parent consented to and fostered the nonparent's formation and establishment of a parent-like relationship between the nonparent and the child;
- The nonparent and the child lived together in the same household;
- The nonparent assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support, without expectation of financial compensation; and
- The nonparent has established a parental role sufficient to create with the child a bonded, dependent relationship parental in nature.[5]

100 P3d. at 560. "The first factor establishes an estoppel-like element and recognizes that, where a legal parent has fostered a parent-like relationship between her child and a nonparent, the right of the legal parent does not extend to erasing a relationship between her partner and her child which

[5]These factors, when considered together, would exclude such nonparents as nannies, au pairs, and babysitters because of the expectation of remuneration.

she voluntarily created and actively fostered simply because after the ... separation, she regretted having done so." Id. (internal punctuation, citations omitted).

The other three elements "further protect the legal parent against claims by neighbors, caretakers, babysitters, nannies, au pairs, nonparental relatives, and family friends." Id. "[N]arrower definitions of 'psychological parent' are useful to restrict the class of nonparents who may seek parental rights." Id. at 561. "[I]nherent in the bond between child and psychological parent is the risk of emotional harm to the child should that relationship be significantly curtailed or terminated." Id. at 560. "Accordingly, and without precisely defining all attributes of a psychological parent, we further conclude that emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term." Id. at 561.

With respect to the dispute between Clark and McLeod, the trial court found "special factors" supporting its order for equal parental responsibility, even though it did not find McLeod was a "psychological parent" nor did it find that termination of the relationship with McLeod would "harm" the child. The "special factors" included Clark's filing for joint custody, sharing of co-parenting responsibilities with McLeod, petitioning to change the child's name to include McLeod's, permitting and actively encouraging McLeod to jointly parent the child, the child's recognition of both as her parents, and the child's growth academically and socially while being parented by both Clark and McLeod. Id. at 561-62. This, coupled with McLeod's significant assumption of parental responsibilities, including contributions to E.L.M.C.'s development without expectation of financial compensation, support a conclusion that McLeod and E.L.M.C. had established "a bonded, dependent relationship parental in nature, whereby E.L.M.C. recognizes McLeod as her mother." Id. at 562.

Even though the trial court awarded Clark "sole parental responsibility...in the area of religion," Clark was also ordered to "make sure that there is nothing in the religious upbringing or teaching that the minor child is exposed to that can be considered homophobic." Id. at 562-63. The trial court had noted that Clark and McLeod would never be able to agree regarding the child's religious upbringing. Id. at 564. The Court of Appeals viewed this part of the order in a dim light, notably because the trial court did not define what "homophobic" means or that E.L.M.C.'s exposure to such teachings would either endanger the child's physical health or significantly impair her emotional development. Id. Further, neither party presented authority describing homophobia in terms of religious doctrine. Id. "[H]arm to the child must be shown before a custodial parent's constitutional right to determine the child's religious upbringing can be restricted in resolving a custody dispute." Id. at 563. There are "very few cases" where "the requisite substantial harm had been demonstrated," the court added. Id. Courts typically "have no jurisdiction over quintessentially religious controversies." Id. at 564 (internal punctuation, citation omitted).

The appellate court rejected McLeod's argument that this portion of the trial court's order was a "mere nondisparagement clause" because "it is not so described in the trial court's order. Nor is it mutual." Id. "[G]iven the important role that religious freedom enjoys in our constitutional scheme of ordered liberty [citations omitted], we conclude that remand is necessary" for further findings regarding the child's religious upbringing. Id.

The Colorado Supreme Court, on October 25, 2004, declined to review the appellate court's decision. In the Interest of E.L.M.C., 2004 Colo. LEXIS 851 (Colo. 2004).

Pennsylvania

The Indiana Court of Appeals in A.B., *supra*, relied upon T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001), a decision by the Pennsylvania Supreme Court directly applying the doctrine of *in loco parentis* as a method of conferring standing on one seeking partial custody of a child for visitation purposes. The plaintiff and defendant, both females, had been engaged in an exclusive relationship where, *inter alia*, they shared finances and expenses and jointly purchased a home. The two agreed that L.R.M. would be impregnated through donor sperm with T.B. selecting the donor. T.B. cared for L.R.M. during her pregnancy, attended childbirth classes with her, and was designated as the co-parent so she could be present for the birth of the child, A.M.. 786 A.2d at 914-15.

Although T.B. and L.R.M. did not enter into a formal parenting agreement, L.R.M. did name T.B. as guardian of A.M. in her will. Both shared day-to-day child-rearing responsibilities. A.M. referred to T.B. as her "aunt." T.B. was active in A.M.'s life but was deferential to L.R.M. where parental decisions were to be made. All three took family vacations together. Id. at 915.

Shortly before A.M. was three years of age, T.B. and L.R.M. purchased another home together. However, shortly thereafter, T.B. left the home and became involved with another woman. Shortly after they separated, L.R.M. would not permit T.B. to visit A.M., refusing all visitation requests, telephone calls, and gifts for the child. T.B. filed a "Complaint for Shared Legal and Partial Custody and Visitation," contending that she should be granted partial custody of A.M. with visitation rights because she had acted as A.M.'s parent for more than three years while T.B. and L.R.M. lived together with A.M. L.R.M. challenged T.B.'s standing to initiate such an action.

A hearing officer concluded T.B. had standing to seek custody and visitation based on the doctrine of *in loco parentis*, adding that it would also be in A.M.'s best interests to grant T.B. partial custody for the purposes of visitation. Id. L.R.M. timely filed objections to the hearing officer's determinations.

The trial court agreed with the hearing officer, as did the Pennsylvania Supreme Court.

> The phrase "*in loco parentis*" refers to a person who puts oneself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. The status of *in loco parentis* embodies two ideas: first, the assumption of a parental status, and, second, the discharge of parental duties. [Citations omitted.] The rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between a parent and child. [Citation omitted.] The third party in this type of relationship, however, cannot place himself *in loco parentis* in defiance of the parents' wishes and the parent/child relationship.

Id. at 916-17 (emphasis original). L.R.M. argued that T.B. does not meet the common law application of *in loco parentis* for standing purposes because T.B. can never legally adopt A.M. nor can she assume the obligations of a "lawful parent" because of a Pennsylvania statute that precludes same-sex marriages and case law holding that a parent's same-sex partner cannot adopt that parent's child without the parent relinquishing her parental rights. The Pennsylvania Supreme Court was not persuaded.

> Simply put, the nature of the relationship between [L.R.M.] and [T.B.] has no legal significance to the determination of whether [T.B.] stands *in loco parentis* to A.M. The ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties. What is relevant, however, is the method by which the third party gained authority to do so. The record is clear that [L.R.M.] consented to [T.B.'s] performance of parental duties. She encouraged [T.B.] to assume the status of a parent and acquiesced as [T.B.] carried out the day-to-day care of A.M. Thus, this is not a case where the third party assumed the parental status against the wishes of the biological parent.

Id. at 918-19. The Supreme Court also rejected L.R.M.'s representations that T.B. acted no more than as a caretaker or a babysitter for A.M. The hearing officer resolved all issues of credibility, finding that T.B., L.R.M., and A.M. lived together as a family unit, and that T.B. assumed and discharged the role of co-parent for A.M. Id. at 919. T.B. established that she assumed a parental status and discharged parental duties with the consent of L.R.M. The hearing officer and the trial court properly found that T.B. stood *in loco parentis* to A.M. and, as a consequence, had standing to seek partial custody for the purposes of visitation. Id. at 920.

Washington

The Indiana Court of Appeals also referred to a case from Washington in deciding A.B., *supra*. In Re the Parentage of L.B., 89 P.3d 271 (Wash. App. 2004) involved two women–Sue Ellen Carvin and Page Britain–who had a 12-year domestic relationship. During this relationship, Britain gave birth through artificial insemination to L.B. When Carvin and Britain separated, Carvin sought status as a *de facto* or "psychological parent" to L.B. as well as visitation rights. After Carvin filed her action, Britain married the sperm donor, who acknowledged paternity of L.B. The trial court ruled Carvin had no cause of action and dismissed her petition. The Washington Court of Appeals was not so sure. 89 P.3d at 273-74.

Carvin assisted Britain during her pregnancy, attending pre-natal appointments, child-birthing classes, and counseling sessions. Carvin was present when L.B. was born. Britain and Carvin participated jointly in naming L.B. Carvin assisted in L.B.'s care and was L.B.'s principal caregiver during the first six years of L.B.'s life, including being the "primary parent" to deliver L.B. to and from daycare, school, sports practices and games. Carvin attended L.B.'s school functions. Carvin also contributed financially to the domestic relationship. Carvin was listed as L.B.'s "mother" on the school registration forms. Britain was, at one time, open to Carvin adopting L.B., but this never occurred. Id. at 274-75.

The domestic relationship between Britain and Carvin soured until Britain broke off the relationship. Initially, Carvin and Britain continued to share parenting responsibilities, but Britain began to view Carvin's role as harmful to L.B. and began limiting Carvin's contact with L.B. Eventually, Britain unilaterally decided to end all contact between Carvin and L.B. Id. at 275.

When Carvin filed her petition, Britain married the sperm donor, who acknowledged paternity. Thereafter, L.B.'s records were changed to reflect her father. Id.

On appeal, Carvin argued that her request for a determination of co-parentage is based on her having become a *de facto* parent with whom L.B. is psychologically bonded, and that it would be detrimental to L.B.'s growth and development to deprive L.B. of the *de facto* parenting relationship that was fostered with Britain's consent and active participation. However, Carvin acknowledged that her petition is not based on any allegation that Britain is unfit or that Britain has abandoned the child. Rather, her *de facto* parentage claim rests on a potential extension of common law in the absence of any statutory basis. Id. at 282.

"Common law" is a creation of the courts rather than of legislatures. Id. at 279. Because the issue raised by Carvin was one of first impression in Washington, the appellate court looked to other jurisdictions for guidance. It settled on In the Custody of H.S.H.-K, the Wisconsin Supreme Court case discussed in detail *supra*. Id. at 282. The appellate court also relied upon E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999), also cited *supra* at footnote 2.

E.N.O. defined "a *de facto* parent as one who has no biological relation to the child, but has participated in the child's life as a member of the child's family...resides with the child, and, *with the consent and encouragement of the legal parent*, performs a share of caretaking functions at least as great as the legal parent, as long as the care was not provided primarily for compensation." Carvin, 89 P.3d at 283, quoting E.N.O. and adding emphasis.

Britain argued against any extension of the common law, asserting that any recognition of "*de facto* parentage" would create a "pseudo adoption" without constitutional constraints. Id. at 283. The Washington Court of Appeals was not persuaded by this argument, noting that the *de facto* parentage rule recognized by other states "*emphasizes the original consent of the legal parent to the relationship*, a protection recognized in Washington adoption statutes." Id. (emphasis original).

Based in part on H.S.H.-K. and E.N.O., the appellate court found that "a common-law claim of *de facto* parentage or psychological parentage" does exist. Id. at 284. "[A] biological parent's rights as a fit parent do not necessarily trump a child's right to maintain a relationship with her *de facto* parent, a relationship that the biological parent both consented to and encouraged." Id. This finding "reflects the evolving nature of families in Washington. Accordingly, we hold that a common-law claim of *de facto* or psychological parentage exists in Washington such that Carvin can petition for shared parentage or visitation with L.B.... We also hold that the *de facto* parent-child relationship must have been formed with the consent and encouragement of the biological parent." Id. at 285.

In order for Carvin to prove the existence of a parent-child relationship, she must present sufficient evidence that:

- The natural or legal parent consented to and fostered the parent-like relationship;
- Carvin and L.B. lived together in the same household;
- Carvin assumed obligations of parenthood without expectation of financial compensation; and
- Carvin must have been in the parental role for a length of time sufficient to have established with L.B. a bonded, dependent relationship that was parental in nature.

Id. The Court of Appeals reversed the trial court on the common-law question, finding that there is a common-law claim of *de facto* or psychological parentage in the State. The dispute was remanded to the trial court for further proceedings, including the appointment of a Guardian Ad Litem for L.B.

ATTORNEY FEES BY DEGREES: WHEN DOES ONE "PREVAIL"?

The Individuals with Disabilities Education Act (IDEA) authorizes a court to award reasonable attorney fees to a parent of a child with a disability who is the prevailing party in a dispute brought under the IDEA. 20 U.S.C. § 1415(i)(3). The court can also reduce or prohibit such an award under certain circumstances. Indiana's rules and regulations implementing the IDEA in this state incorporate these provisions. See 511 IAC 7-30-4(p), 511 IAC 7-30-6.

Most attorney fee requests are addressed by federal courts. It is seldom that such disputes find their way into a state court. The only other major case of this sort reported in Indiana is Miller v. West Lafayette School Corporation, 665 N.E.2d 905 (Ind. 1996), where the Indiana Supreme Court held that a parent-attorney representing his own child in an IDEA dispute is a *pro se* litigant and not entitled to recover attorney fees as a prevailing parent.[6] The Indiana Court of Appeals has now weighed in on trickier question: What does it mean to "prevail"?

MSD of Lawrence Township v. M.S., 818 N.E.2d 978 (Ind. App. 2004) began as an administrative hearing under 511 IAC 7-17 *et seq.* ("Article 7"), specifically 511 IAC 7-30-3. The dispute centered around a nine-year-old student with multiple disabilities, including mobility impairment. She used a wheelchair but she also used a "stander" during the day to help strengthen her legs and torso muscles as well aid her in digestion. The parent requested the student be transferred to a different school so she could participate in a "Life Skills" program. The student was transferred to the new school and participated in both general education and the "Life Skills" program. The student's Case Conference Committee (CCC)[7] revised the student's Individualized Education Program (IEP) to indicate the student would use the "stander" twice a day for one hour each session. During the

[6]See "Attorney Fees: Parent-Attorney," **Quarterly Report** April-June: 1996.

[7]"Case Conference Committee" is Indiana's term for the team of persons responsible for reviewing and revising an eligible student's Individualized Education Program (IEP), among other responsibilities. Both IDEA and Article 7 identify specific persons who must be members of the Case Conference Committee. See 511 IAC 7-27-3.

school year, the parent became concerned the student was not spending as much time in the general education classroom and requested the student be transferred to her original school. The school district disagreed. The parties were unsuccessful in mediating the dispute.[8] 818 N.E.2d at 980.

During this period, school staff became concerned that the one-hour "stander" sessions were causing the student's knee caps to dislocate. School personnel notified the parent that the sessions would be reduced to 30-45 minutes each until a medical opinion could be obtained regarding the advisability of a one-hour session. Shortly thereafter, the parent withdrew the student from the school district and requested a due process hearing, raising 22 issues, many of which were allegations of violations of Article 7 rather than student-specific program disputes.

Following a hearing, the Independent Hearing Officer (IHO) found the school district did fail to comply with Article 7 in the following four instances:

1. The school failed to include the parent in the CCC meeting where it was decided to reduce the student's time in the "stander" and by failing to document student progress in the use of the "stander" for a two-month period;
2. The school failed to have one of the student's general education teachers attend the CCC meeting;[9]
3. The school failed to make available to the parent at least five (5) instructional days prior to the CCC meeting a copy of one of the student's evaluations;[10] and
4. The school failed, by twelve (12) days, to review and revise the student's IEP on an annual basis.[11]

Id. at 981. The IHO, however, found that these procedural violations were not "material" violations in that they did not result in a denial of a "free appropriate public education" (FAPE) to the student. Id. The IHO did issue orders, but these orders addressed the procedural lapses and were akin to corrective action typically ordered through a complaint investigation.[12] Id. Neither party sought administrative review by the Board of Special Education Appeals.[13]

---

[8]See 511 IAC 7-30-1 for the mediation procedures under Article 7.

[9]A general education teacher is a required CCC participant where, as here, the student is or may be participating in the general education environment. 511 IAC 7-27-3(a)(4).

[10]This is an Indiana-specific requirement. See 511 IAC 7-25-4(l).

[11]See 511 IAC 7-27-7(d).

[12]Complaint investigations are conducted by the Indiana Department of Education, Division of Exceptional Learners (DEL), under 511 IAC 7-30-2. These investigations are concerned with allegations a public agency has failed to comply with State or Federal special education laws. However, where such issues have been raised with respect to parties already under the jurisdiction of an IHO, the DEL will refer the complaint issues to the IHO. See 511 IAC 7-30-2(l).

[13]See 511 IAC 7-30-4.

The parent then filed in court for attorney fees, asserting that she "had prevailed on some of the issues in contention" at the due process hearing, adding that the IHO's orders "changed the legal relationship between [the student] and the [school] and ordered changes in the school's policies and procedures." Id. at 981-82. The school moved for summary judgment, arguing the parent did not prevail on any significant issue nor did the parent establish any substantive right for the student. The parent filed a cross-motion for summary judgment, claiming the student was denied a FAPE and that the violations were material ones.

The trial court noted the IHO had found the school did not deny a FAPE to the student and that the procedural violations were not "material." The trial court also noted the IHO found the school was justified in unilaterally reducing the student's time in the "stander" because of the "reasonably perceived imminent risk." When the parent eventually did provide the medical authorization, the IEP was implemented fully. Id. at 982-83. Although the parent had "prevailed" on only four (4) of the 22 issues raised, the trial court declined to employ a "scorecard of issues" as a means of determining whether the parent prevailed for IDEA and Article 7 purposes. The trial court found the unilateral reduction in "stander" time for two months was a significant issue upon which the parent prevailed, granting judgment to the parent in the amount of $5,000, which was one-half of the amount sought by the parent.[14] Id. at 984.

The school filed a Motion to Correct Errors, arguing in part that a substantial period of time when the "stander" was not used at school, the parent had withdrawn the student from the school. The trial court denied the Motion. The school appealed to the Indiana Court of Appeals. Id. at 985.

The Court of Appeals reversed the trial court, finding the parent did not prevail in the due process hearing. The appellate court noted the IHO did not designate any party as "prevailing." Under such a situation, the trial court will need to review the IHO's order and the evidence presented at the due process hearing. If the parent realized "only limited success," the parent cannot be considered the prevailing party. The parent must have succeeded on a "significant issue in the litigation which achieves some of the benefit" the parent sought in initiating the due process hearing. Id. at 986, quoting Kellogg v. City of Gary, 562 N.E.2d 685, 714 (Ind. 1990), Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S. 782, 789, 109 S. Ct. 1486 (1989). "Thus, at a minimum, to be considered a prevailing party...the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." Id. "Where such a change occurs, the degree of the plaintiff's success goes to the reasonableness of the award...not to the availability of a fee award[.]" Id. quoting Garland, 489 U.S. at 793, 109 S. Ct. at 1494.

In this case, the IHO found in favor of the parent on the "stander" issue; however, the IHO concluded the school's procedural lapses did not constitute a "material violation." Specifically, the IHO held:

[14]Actually, the parent sought $12,076.15 in attorney fees. 818 N.E.2d at 983.

> Had it not been for the reasonably perceived medical emergency, the failure of the [School] to include the parents in a CCC decision regarding the reduction of the child's time in the "stander" would have been a violation that might lead to arbitrary and erroneous decision making and therefore a material violation. When a choice has to be made between CCC procedure and the abatement of a reasonably perceived imminent risk to the child's physical well-being, the latter consideration must certainly take precedence.

Id. at 986-87. The Court of Appeals agreed with the school that the evidence did not support the trial court's determination that the school kept the student out of the "stander" for two months. The evidence showed the following time line: On February 1st, school personnel became concerned the one-hour sessions on the "stander" were causing the student's knee caps to dislocate. The teacher informed the parents the CCC had reduced the session time for the "stander" until the parent could provide medical authorization.[15] On February 11th, the parent requested a due process hearing and then withdrew the student the following day to home-school her. On March 31st, the parent provided the school the physician's statement regarding the student's session times in the "stander." The school did not deny the student access to the "stander" for the brief period she was in school from February 1st to February 11th. From that time to March 31st, the student was not in the school; rather, she was being home-schooled. The trial court's finding the school denied the student access to the "stander" for two months is not supported by the record.

> While we acknowledge that success on an issue involving a child's physical needs has the potential to be significant, we cannot conclude that success on this issue, significant or not, achieved some of the benefit the Parents sought in bringing the due process action. The hearing officer's order from the due process hearing shows that the Parents' request for a due process hearing was motivated by their desire to have [the student] transferred to a school where she could spend more time in a general education classroom. Furthermore, the hearing officer did not order the School to put [the student] back in the stander. The hearing officer only ordered the School to circulate a memo to appropriate staff reminding them that progress toward [the student's] IEP goals needed to be adequately documented. Indeed, the evidence shows that prior to the due process hearing, the Parents had resolved the issue of whether [the student] would be put in the stander for one-hour increments when they complied with the School's request to provide a written assurance from a physician that the one-hour period in the stander was not injuring [the student]. Therefore, we cannot say that the Parents achieved some of the benefit they sought in bringing the due process action. Thus, as a matter of law, the Parents were not a prevailing party entitled to reimbursement of attorney fees from the due process hearing

[15]The court's decision is unclear as to how the CCC made this determination without the parent present. 511 IAC 7-27-3(a)(5). A CCC meeting can be held without the parent in attendance where the parent declines to participate. See 511 IAC 7-27-3(h). Neither party raised this as an issue.

Id. at 988. The trial court should have granted summary judgment to the school. Accordingly, the Court of Appeals reversed the trial court and remanded the matter so that the summary judgment could be awarded to the school. Id.

Procedural Flaws and Denial of FAPE

Every analysis as to whether a procedural flaw by a public agency resulted in a denial of FAPE to a student must begin with Board of Education of the Hendrick Hudson Central School District Board of Education *et al.* v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982) the U.S. Supreme Court's initial foray into special education. This is the case that initially defined, in a substantive manner, "free appropriate public education." In Rowley, the court stated the federal law required that the education to be provided to eligible students with disabilities "confer some educational benefit…" 458 U.S. at 200. This "basic floor of opportunity" must consist "of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Id. at 201. "It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." Id. To assess whether a student has been afforded a FAPE, the court established a two-fold inquiry: "First, has the State complied with the procedures set forth in the Act [now IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefit? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." 458 U.S. at 206-07.

The Supreme Court did not hold that every failure to comply with a procedural requirement constitutes a denial of FAPE. The inquiry is two-fold, as noted. There could be procedural violations that did not prevent the development and implementation of an IEP that was "reasonably calculated to enable the child to receive educational benefit." In short, a procedural error may not necessarily result in an *ipso facto* denial of FAPE.

Courts have been fairly uniform in the approach to the first prong of this inquiry, finding a procedural defect in the process as a denial of FAPE only where the lapses (1) result in the loss of educational opportunity for the student, or (2) seriously infringe upon the parent's opportunity to participate in the process for formulating the student's IEP. This is better known as the "Harmless Error" test. A recent opinion out of the U.S. 9th Circuit Court of Appeals, however, tends to depart from this test. M.L. v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005) "extrapolates from the criminal context"[16] to create a more onerous standard, but not without much misgiving.

[16]See 394 F.3d at 653, where Judge Ronald M. Gould, in concurring in the ultimate determination but disagreeing with the standard to be employed, characterized Judge Arthur L. Alarcón's standard for "structural defects" in this manner. It is difficult to characterize Judge Alarcón's decision as the "majority" opinion as the three-judge panel all issued separate opinions, with Judge Gould concurring with Judge Alarcón's ultimate determination (FWSD denied M.L. a FAPE through lost educational opportunity) but by employing the generally accepted "harmless error" standard. Judge Richard R. Clifton dissented entirely with Judge Alarcón but concurred with Judge Gould as to the standard to be

M.L. is a child with primary disabilities of autism and mental retardation. Communication was difficult and he had frequent temper tantrums with displays of aggressive behavior (hitting, biting, scratching, pinching, crying, whining). M.L. was successfully integrated into a preschool class that was predominantly children without disabilities (about 12 students without disabilities, with five or six students with disabilities). He was in this preschool class for three years during which time his skills improved, he began to interact more frequently with the other children, and he began to participate more in classroom activities, albeit on a somewhat limited basis. He had a one-to-one aide during this time. As his ability to communicate increased, his frustration level decreased (as did some of the attendant aggressive behaviors).

The student's IEP Team met and developed an IEP to be implemented in an integrated kindergarten class the next school year. However, the parents moved during the summer to a different school district in Washington, the Federal Way School District (FWSD). 394 F.3d at 636-38.

FWSD implemented the other school's IEP and placed M.L. in an integrated kindergarten class. FWSD hired a series of one-to-one instructional aides for M.L., but each quit after one day. The relationship between the student's mother and the kindergarten teacher also deteriorated over the mother's perception the teacher was not proactive enough in addressing purported teasing of M.L. by other students. The mother complained to a school administrator who, in turn, asked the kindergarten teacher to attend to the matter. The kindergarten teacher expressed her displeasure at the mother's contact with the administrator and asked the mother to address such concerns to her in the future. The mother responded by unilaterally withdrawing M.L. from school. All in all, M.L. had attended five (5) days of kindergarten when withdrawn. Id. at 636-39.

Notwithstanding the mother's unilateral action, the FWSD offered a placement in a self-contained classroom at another elementary school. The mother rejected the placement as too restrictive. FWSD put together a multidisciplinary evaluation team that included the mother. The multidisciplinary evaluation team was engaged in conducting an "initial evaluation." The eventual Evaluation Report recommended an educational program that had a small class size, provided visual supports, and had predictable and consistent schedules and routines. FWSD again offered the more restrictive placement at several elementary schools, but the mother rejected the offers. The parents objected to the Evaluation Report and asked for an Independent Educational Evaluation (IEE). The FWSD, in response, requested a due process hearing. Id. at 639-40.

FWSD then attempted to establish a date and time for convening an IEP Team. Both sides, however, dug in their respective heels. The parents indicated they could not be available except before or after school and only on certain days. The FWSD established a date but said "that an IEP meeting could be conducted only during the day from 7:00 a.m. to 4:00 p.m. on any day Monday through Friday." Id. at 640. The positions of the parties were not reconcilable. The parents refused to participate,

---

employed–but disagreeing with Judge Gould that the procedural defects constituted a denial of FAPE. This decision was originally issued at the 387 F.3d 1101 (9th Cir. 2004) but was amended and reissued under the citation referenced herein.

even by telephone. FWSD held the IEP Team meeting anyhow. But this is where the problem occurs. The Notice of the IEP Team meeting indicated a "regular education teacher"[17] would be in attendance, but when the IEP Team was convened, no "regular education teacher" was present or participated. The IEP Team did consider a letter from M.L.'s former teacher at the previous school district, who recommended an integrated kindergarten setting with a one-to-one instructional aide. FWSD, through the IEP Team meeting, again offered the self-contained classroom at an elementary school, the same placement offered after the mother withdrew M.L. from kindergarten. The parents requested a due process hearing. Following an eight-day hearing, the Administrative Law Judge (ALJ) found, in part, that the IEP Team was properly constituted. Id. at 641.

The parents sought judicial review. The federal district court denied the parents' motion for partial summary judgment on the allegation FWSD failed to comply with IDEA's procedural requirements by not including a "regular education teacher" as a member of the IEP Team. The court denied the parents' motion, opining that the IEP Team, given the students' needs and lack of potential to be in a general education environment, did not necessarily need to include a "regular education teacher" on the IEP Team. In the alternative, the court found that even if this were a procedural defect, it was "harmless error" and did not deny a FAPE to M.L. Id.

On Appeal, the three-judge panel of the U.S. 9th Circuit Court of Appeals noted that IDEA, at 20 U.S.C. § 1414(d)(1)(B)(ii), requires an IEP Team to include "at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment[.]" See also 34 C.F.R. § 300.344(a). The court also cited to 34 C.F.R. Part 300, Appendix A, which is a series of 40 interpretative constructions that serve as guidance in understanding various IDEA concepts. The specific construction at issue is No. 24:

> **24. What is the role of a regular education teacher in the development, review and revision of the IEP for a child who is, or may be, participating in the regular education environment?**
>
> As required by §300.344(a)(2), the IEP team for a child with a disability must include at least one regular education teacher of the child if the child is, or may be, participating in the regular education environment. Section 300.346(d) further specifies that the regular education teacher of a child with a disability, as a member of the IEP team, must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including assisting in—(1) the determination of appropriate positive behavioral interventions and strategies for the child; and (2) the determination of supplementary aids and services, program modifications, and supports for school personnel that will be provided for the child, consistent with 300.347(a)(3) (§300.344(d)).

[17]The federal law refers to a "regular education teacher." Indiana uses the term "general education teacher."

> Thus, while a regular education teacher must be a member of the IEP team if the child is, or may be, participating in the regular education environment, the teacher need not (depending upon the child's needs and the purpose of the specific IEP team meeting) be required to participate in all decisions made as part of the meeting or to be present throughout the entire meeting or attend every meeting. For example, the regular education teacher who is a member of the IEP team must participate in discussions and decisions about how to modify the general curriculum in the regular classroom to ensure the child's involvement and progress in the general curriculum and participation in the regular education environment.
>
> Depending upon the specific circumstances, however, it may not be necessary for the regular education teacher to participate in discussions and decisions regarding, for example, the physical therapy needs of the child, if the teacher is not responsible for implementing that portion of the child's IEP.
>
> In determining the extent of the regular education teacher's participation at IEP meetings, public agencies and parents should discuss and try to reach agreement on whether the child's regular education teacher that is a member of the IEP team should be present at a particular IEP meeting and, if so, for what period of time. The extent to which it would be appropriate for the regular education teacher member of the IEP team to participate in IEP meetings must be decided on a case-by-case basis.

Id. at 641-43. The court noted that the "plain meaning" of this language "compels the conclusion that the requirement that [at] least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom, is mandatory–not discretionary." The federal district court's and the ALJ's determination the IEP Team was properly constituted was "clearly erroneous." Id. at 644.

Judge Alarcón, writing the majority opinion, noted "the Supreme Court has not expressly determined whether a violation of the procedural requirements of the IDEA is subject to the harmless error review." Id. at 644. He added that the 9th Circuit, in past decisions, has employed the "harmless error" standard, finding that procedural flaws do not automatically equate with a denial of FAPE. Rather, the procedural inadequacies would constitute a denial of FAPE only where there was a loss of educational opportunity to the student or the parent's opportunity to participate in the formulation process for the IEP was seriously infringed. Id. at 644-45.

FWSD argued that either a "regular education teacher" was not needed or, if one were required, the absence of the "regular education teacher" was not the type of procedural anomaly that could be considered a flaw sufficient to constitute a denial of FAPE to the student.[18] Id. at 648.

---

[18]The one thing all three panel members did agree upon was that the FWSD's procedures did not seriously infringe upon the parents' right to be a part of the IEP formulation process. The parents' lack of participation was an election they made.

Both the majority and concurring opinion disagreed with FWSD's assertions. The majority opinion observed that FWSD's IEP Team "did not include individuals Congress concluded were most knowledgeable about a disabled student's special educational needs. As a result, we have no way of determining whether the IEP team would have developed a different program after considering the views of a regular education teacher. The failure to include at least one regular education teacher on the IEP team was a structural defect in the constitution of the IEP team." Id.[19]

Structural Defect/Error Test

Judge Alarcón then laid out what appears to be a "bright line" analysis for determining when a procedural defect is a structural defect and, consequently, a *de facto* denial of FAPE. Relying principally upon criminal cases, he defined a "structural defect" as "an error that permeates the entire conduct" of the proceeding. He also cited to two cases involving the review of reserve military officers. By statute, such a reviewing board must include reserve officers. It was uncontested that reserve officers were not included on these review boards when they determined promotions and terminations. From these cases, Judge Alarcón devised a "Rule of Automatic Reversal" based upon the two following justifications:

- "[S]ome errors are so inimical to judicial or fair process that their violation cannot be tolerated under any circumstances. Application of the test of harmless error would result in the dilution of the afforded protection."

- Because the error is so fundamental, a court "has no way of evaluating the effect of the error on the judgment in the dark of what might have been but never was."

Id. at 649 (citation omitted). The second justification was deemed more important under these facts. "[I]t is not possible for a reviewing body to determine what effect the error had on the judgment of the original proceeding," thus forcing "us to conclude that the doctrine of harmless error cannot be applied to this type of procedural error." Id. The procedural error–the failure to include a "regular education teacher" in the IEP formulation process–"is a structural defect that prejudices the right of a disabled student to receive a FAPE." The court rejected FWSD's argument the "regular education teacher" was not warranted because M.L. wasn't going to be placed in a general education classroom based on the recommendations from the Evaluation Report. The court questioned whether FWSD did not pre-determine the educational placement. Notwithstanding, the student's previous placement had been an integrated one; the school district listed a "regular education teacher" as being a member of the IEP Team, although she did not appear; his former teacher (who had three years' experience with him) believed an integrated setting was appropriate to his needs; and FWSD had little experience with M.L. These facts support "an inference that it was possible that M.L. would be placed in a regular education classroom. So long as this was a possibility, participation of a regular education teacher in the IEP team was required by the IDEA." Id. at 650-

[19]Judge Alarcón used "structural defect" and "structural error" interchangeably.

51. When FWSD learned its IEP Team would not have the requisite membership, it "should have cancelled that meeting instead of proceeding with an illegally constituted IEP team." Id. at 651.

The court also disagreed with FWSD that the parents somehow waived their right to object to the procedural error by failing to attend the IEP Team meeting. IDEA imposes upon the FWSD–and all school districts–the duty to comply with IDEA's requirements. There is no "assumption-of-the-risk defense." Parents cannot be held responsible for a school district's violation of IDEA's procedural requirements. Id.

> The FWSD's failure to ensure the participation of a regular education teacher on the IEP team when there was a possibility that M.L. would be placed in an integrated classroom was a significant violation of the structural requirements of the IDEA's procedures requiring vacation of the order granting summary judgment in favor of the FWSD.

Id. On remand, the FWSD is to staff an IEP Team that fully complied with IDEA's requirements.

Harmless Error Test

Although Judge Gould, in his concurring opinion, agreed that FWSD's failure to include a "regular education teacher" on the IEP Team for M.L. necessitated reversal of the district court's grant of summary judgment for FWSD, he reached this conclusion using the standard "harmless error" test to find the procedural defect did, in fact, serve to deny M.L. a FAPE through the loss of educational opportunity. He questioned Judge Alarcón's "structural defect/error" test, noting that the judge cited no precedent where the "structural error" test had been applied to any civil case, much less one that is IDEA-specific. "[O]ur sister circuits have consistently rejected *per se* IDEA structural error arguments, and instead have adopted case-by-case, harmless error inquiries similar to our standard[.]" Id. at 653-54(emphasis original). Judge Gould noted that the "structural defect/error" test proposed by Judge Alarcón sets forth no "qualitative distinction" so as to know which procedural defect is a *per se* one requiring reversal and which is not.

> ...Judge Alarcón's opinion posits no necessary or logical stopping point prohibiting future courts from applying a structural error approach to virtually any IDEA procedural error. In my view, the best means by which to differentiate between such errors is to evaluate each one individually–as colored by each case's particular facts–and to apply a uniform standard that assesses lost educational opportunity or lost parental participation, not by adopting a *per se* rule that insulates a subset of errors from future review.

Id. at 655. Given IDEA's statutory preference for mainstreaming, the input of a general education teacher for a student who may be in a general education environment can be invaluable.

> The statutory requirement that an IEP team for a disabled child who is or may be in regular education must include a regular education teacher is not merely technical.

> A regular education teacher may have insights or perspectives that aid the process of IEP formation. We need not say that error in composition of an IEP team is always prejudicial and invariably results in the denial of a FAPE. Rather, we should assess the circumstances of each case, and here the record demonstrates that the failure to include [a regular education teacher from FWSD] or [his former teacher] or any other regular education teacher on the participating IEP team deprived M.L. of an educational opportunity.

Id. at 656. Judge Clifton agreed that FWSD should have included a "regular education teacher" on the student's IEP Team and that FWSD's failure to do so was a procedural violation of IDEA. He also agreed with Judge Gould "that a structural error analysis is not supported by our caselaw and has no place in the IDEA context." Id. at 658. Even though there was a procedural violation, this did not constitute a denial of FAPE to the student because there was no lost educational opportunity nor were the participation rights of the parent significantly restricted. Id.

The M.L. case differs from the Indiana Court of Appeals' decision in Lawrence Township, *supra*, where the IHO and the appellate court agreed that the absence of a general education teacher at the student's CCC meeting did not constitute a denial of FAPE even though the attendance of the teacher was required by both State and Federal law. Neither the IHO nor the Court of Appeals made reference to the "harmless error" test, but it is apparent this was the analysis the IHO employed.

The Rowley standard has been incorporated into the IDEA through the Individuals with Disabilities Education Improvement Act of 2004, effective July 1, 2005. 20 U.S.C. § 1415(f)(2) provides:

> (E) DECISION OF HEARING OFFICER.—
>
> (i) IN GENERAL.— Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.
>
> (ii) PROCEDURAL ISSUES.—In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—
>
> (I) impeded the child's right to a free appropriate public education;
>
> (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
>
> (III) caused a deprivation of educational benefits.
>
> (iii) RULE OF CONSTRUCTION.—Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

This is the first time that Congress has specifically addressed the Rowley standard by incorporating it into the IDEA. The language utilizes a "harmless error" approach rather than a "structural defect/error" approach that would convert a procedural violation of a requirement of the IDEA into

a denial of FAPE, such as in the M.L. case above, in contrast with Lawrence Township where the same procedural violation did not constitute a denial of FAPE.

"RELEASE TIME" AND THE ESTABLISHMENT CLAUSE

Although considerable attention has been focused on accommodation of prayer and other religious expression within the public school context, there has been little attention paid to "release time" programs where students are released from attendance at their public schools during the instructional day to attend or receive religious instruction.[20] This is not a topic that has generated much litigation, probably because the U.S. Supreme Court addressed it twice in quick succession in 1948 and 1952.

In 1948, the Supreme Court found that a "Release Time" program in an Illinois school district violated the Establishment Clause of the First Amendment.[21] The religious teachers were permitted on-grounds and taught in the public school's regular classrooms. Classes were offered in grades four to nine for 30 to 45 minutes. Attendance in the program required written parental permission. Although the religious teachers were not employees of the school district, the local superintendent did have the authority to approve and supervise the religious teachers. Attendance was taken. Those students who did not wish to participate were required to leave the classroom and go to another place within the school building to continue secular studies. This, the Supreme Court found, was an impermissible use of the "tax-established and tax-supported public school system to aid religious groups to spread their faith." Illinois *ex rel.* McCollum v. Board of Education of School District No. 71, Champaign County, Illinois *et al.*, 333 U.S. 203, 68 S. Ct. 461 (1948).

Four years later, the Supreme Court revisited the issue in Zorach *et al.* v. Clauson *et al.*, 343 U.S. 306, 72 S. Ct. 679 (1952). In Zorach, the court reviewed a New York statute that permitted public schools to institute a "release time" program. The program had to be off-grounds and pursuant to parental permission. Attendance was taken. The program could be offered for only an hour a week and then at the end of a class session. The "hour of release" had to be the same for all religious instruction. The public school could not promote the program, and school officials were not to

---

[20]Congress directed the Secretary of the U.S. Department of Education, as a part of the No Child Left Behind Act of 2001, to issue guidance on constitutionally protected prayer in public elementary and secondary schools. The Secretary did issue such guidance on February 7, 2003. See http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html. Although 20 U.S.C. § 7904 required the Secretary to issue such guidance–and to update it every two years–it would be impossible to address every controversy implicating the tension between the First Amendment's Establishment Clause and publicly funded education. The Secretary confined his guidance to such in-school activities as prayer groups, religious clubs, moments of silence, religious expression in classroom assignments, religious expression at extracurricular activities and assemblies, prayer at graduation ceremonies, and baccalaureate ceremonies. The guidance does not address "release time" programs...at least not yet.

[21]The Establishment Clause and Free Exercise Clause of the First Amendment read in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"

comment on any student's attendance or non-attendance at such religious studies. No public funds were expended to support the "release time" programs. Under these facts, the public schools were found to be accommodating religion and not violating the Establishment Clause.

Various State legislatures–as they are wont to do–quickly drafted or amended existing laws to permit "release time" in accordance with Zorach.

"Release Time" in Indiana

Indiana was no exception. The Indiana General Assembly passed a "release time" law initially in 1907, amended it in 1921, amended it in 1943, and then re-codified it in 1973. It has not been amended since. It reads as follows:

> **I.C. § 20-8.1-3-22 Attendance; Public School Children; Religious Instruction**
>
> When the parent of a child who is enrolled in a public school makes a written request, the principal may permit the child to attend a school for religious instruction which is conducted by a church or an association of churches or by an association which is organized for religious instruction and incorporated under the laws of Indiana. If a principal grants permission for a child to attend a school for religious instruction, he shall specify a period or periods, not to exceed one hundred twenty (120) minutes in the aggregate in any week, for children to receive this instruction. Permission to attend a school for religious instruction shall be valid only for the year in which it is granted. Decisions made by a principal under this section may be reviewed by the superintendent of the school corporation. A school for religious instruction which receives pupils under this section shall maintain attendance records and allow inspection of these records by attendance officers. A pupil who attends a school for religious instruction under this section shall receive the same attendance credit which he would receive for attendance in the public schools for the same length of time. A school for religious instruction shall not be supported, in whole or in part, by public funds.

All the Zorach criteria are met, other than the length of time is twice that of New York and there are no specific limitations during the instructional day (or days) when the "release time" can be implemented. There are no regulations that elaborate any further on the statutory language.

There has been only one known dispute implicating this statute, but the challenge is really more directed at administration of the statutory requirements by the public school district than the statute itself.[22] The matter ended up in the federal district court. The resulting decision is unpublished,

[22]See Slip Opinion at 6 ("...Moore does not claim that such programs are unconstitutional *per se*. Instead, Moore challenges the manner in which Perry Township administers its particular program.") This is reiterated, Id. at 8. Although this is the only known dispute, the Indiana Attorney General was asked twice to offer an official opinion regarding the constitutionality of Indiana's "release time" statute, first in

which is unfortunate because the court's decision describes the type of "coercion" the plaintiffs were unsuccessful in showing in either Zorach or Pierce.

In Moore v. MSD of Perry Township, 2001 U.S. Dist. LEXIS 2722 (S.D. Ind. 2001), the plaintiff sought injunctive relief against the school district's "release time" program, which for nearly 30 years had released fourth and fifth grade students in its elementary schools to attend, on a voluntary basis, programs known as the "Perry Township Religious Education Program" (PTREP), a non-denominational but Christian-based association. The program was for 30 minutes a week. Parents had to consent to participation by their children. At some elementary schools, the children attended the religious program in churches, while at the remaining elementary schools, the Association brought a trailer onto the school premises. Slip Opinion at 1-3.

Although the school did not exercise any direct supervisory control over the Association's curriculum, it did request that instruction not be "offensive," be "as nondenominational as possible," and avoid "extreme views." The superintendent did involve himself in one dispute where an Association teacher apparently represented that teaching yoga exercises in physical education classes was not appropriate. Id. at 3.

When participating students left for religion classes, the other students remained with their teachers. No instruction occurred during this time for the non-participating students. The non-participants were required to read silently from books they brought from home or borrowed from the library. They could not do any school work or homework. The non-participants were not allowed to recreate during this time either, as the school did not wish to create a disincentive to students to participate in the Association's programs. Id. at 4.

Zorach played a significant role in the district court's analysis of this dispute. In Moore, not all the students left the campus to attend the religious programs. In those elementary schools where participating churches were not in proximity, the Association brought a trailer onto the school campus. The school district initially paid for the electricity used by the trailers. The school district also allowed the Association into its elementary schools at the beginning of each school year to promote the religious program. Although Moore did not challenge the constitutionality of the Indiana statute, which she conceded did not "suffer from any constitutional infirmities," she asserted that Perry Township's implementation of the program was more analogous to McCollum than Zorach. Id. at 8-9. The court found that the school district's use of its tax-supported public school system to aid a particular religious group in spreading its faith violated the First Amendment. Id. at 9.

A "reasonable person could easily conclude that Perry Township is endorsing religion," the court wrote, noting the access the Association was permitted to the elementary school students, the bringing of trailers onto public school property to provide the instruction, the school's paying of the

---

1948 following the Supreme Court's decision in McCollum, *supra*, and then again following the Supreme Court's decision in Zorach, *supra*. See **A.G.'s Opinion No. 41** (1948) and **A.G.'s Opinion No. 24** (1956).

electric bills occasioned by the use of the trailers, the superintendent's involvement in the determination of "acceptable content" of the religious curriculum, and the superintendent's intervention in a dispute between the Association and public school teachers. Id. at 9-10.

About 70 percent of the students in the fourth and fifth grade classes participated in the Association's program. Moore acknowledged that it would be unrealistic to continue instruction during the absence of most of the students, but she questioned the constitutionality of preventing the remaining students from engaging in *any* school work during this period. The school proffered reasons were two-fold, neither of which were convincing to the court: (1) Parents of participating students would be concerned their children would be falling behind academically compared with the non-participating students; and (2) permitting non-participating students to engage in school work, including homework, would create a disincentive to other parents permitting their children to participate in the Association's program. Id. at 11. The school's "suspension of the regular school curriculum during this release time was motivated by a desire to encourage participation in the PTREP." This is "not a permissible purpose." Id. at 12.

In balancing the relative harms, the court found that any real harm to Perry Township would be inconsequential. The harm to non-participating students was evident. Because there was no adequate remedy at law, the court enjoined the school district, ordering it to remove the trailers and to cease paying the electric bills on behalf of the Association. In addition, the school district had to cease immediately its practice of prohibiting non-participating students from working on school work or homework during the "release time."

Post Script

The court's decision was rendered on February 7, 2001. In March of 2001, the parties reached a settlement, making the court's orders permanent. The school agreed to sever its ties with the Association, remove the trailers from school property, cease payment of electric bills for the Association, and bar Association representatives from making in-school presentations, although written material could be sent home with the children but only to the extent that the school district allows other groups to send material home (*e.g.*, Boy Scouts, Girl Scouts, 4-H).[23]

Back to New York

Although there have been scant legal developments in this area, an important case was recently decided in Pierce v. Sullivan West Central School District, 379 F.3d 56 (2nd Cir. 2004). Pierce takes place in New York and involves the same State law challenged in Zorach. In Pierce, the school district accommodated local desire for off-campus religious education programs by permitting students, with parental consent, to attend either a Catholic program or a Protestant one. The two children implicated in this dispute were neither Protestant nor Catholic. The school district's only involvement was to comply with New York law, although it admitted that for several years it

[23]*The Indianapolis Star* (March 22, 2001).

released students at the wrong time during the instructional day to participate in the religious education programs. The program required parental permission and was limited to one hour of instruction in the middle of every Tuesday morning. Those students not participating remained in the regular school classrooms without any organized activities. There were no programs for other faith traditions because no one outside the school district offered to establish one. Plaintiffs did not want such a program, in any event. 379 F.3d at 57-58.[24]

The two students argued that the method of implementing the program violated the Establishment Clause because they felt humiliated by not participating, were left with nothing to do during the time the participating students were attending their religious classes, perceived the school endorsed the program of religious instruction, and were taunted by "abusive religious invective" from participants in the programs because of their disinclination to participate. The students also complained that students participating in the program were permitted to bring religious literature into the public school classrooms. The overall thrust of the program, they complained, promoted "Christianity...over other religions, and religion...over non-religion." Id. at 58.

The federal district court found that Zorach was controlling and granted the school district's Motion for Summary Judgment. The district court also found that the school district's implementation of the "release time" program did not "coerce" anyone to support or participate in the program. Id. at 59. The students appealed.

On appeal, the U.S. Circuit Court of Appeals for the Second Circuit noted that under Zorach, New York's "release time" policy is not subject to a challenge as to its constitutional validity. Id. However, even the Zorach court noted that "maladministration" of a constitutional law could support an "as applied" cause of action under the Establishment Clause. For such an "as applied" claim to be viable, the school district would have "to be directly implicated in some form of coercion, something that the plaintiffs in Zorach could not show." Id. at 60.

The Pierce plaintiffs, however, failed to distinguish their case from Zorach:

- The program's implementation used no public funds;
- There was no on-site instruction;
- The program was purely voluntary;
- There was no specific coercion or pressure brought to bear by school officials on non-participants; and
- The purported taunting was not by school officials.

Id. It also is "of no constitutional moment" that the religious education programs were offered in proximity to the school or that a majority of the students participated in the programs. Id. at 60-61.

---

[24]The current New York statute authorizing such programs and the implementing regulations can be found at 379 F.3d at 59.

Finding no constitutional fault, the 2nd Circuit affirmed the district court's grant of summary judgment to the school district.

COURT JESTERS: NAME-CALLING

Johnny Cash warbled about "A Boy Named Sue."[25]

Norma Tenaga sang about "Walkin' My Dog Named Cat."[26]

Richard Harris portrayed "A Man Called Horse."[27]

But who would call a child "Weather'by Dot Com Chanel Fourcast Sheppard"?

Marlene Sheppard would, that's who.

Sheppard and Robert Speir, a weatherman at a local NBC-affiliated television station, produced a son. They never married. Sheppard, in addition to Speir's child, has three other children, all with different fathers. Speir sought custody of the child and also sought to have the child's name changed to "Samuel Charles Speir." The trial court agreed this would be in the best interests of the child, but Sheppard disagreed, appealing the trial court's decision to a three-judge panel of the Arkansas Court of Appeals.

In Sheppard v. Speir, 2004 Ark. App. LEXIS 280 (Ark. App. 2004), the appellate court reviewed Sheppard's background. She and her four children live with her mother, her brother, and her brother's wife in a three-bedroom home. The grandmother has custody of two of the children. The house is chaotic. Sheppard has held a number of menial jobs the past twelve years, but she has never remained at one for longer than six to seven months. She has been arrested 29 times locally, all for engaging in a type of creative writing more commonly known as "check forgery."

The trial court was, to say the least, puzzled by the name given the youngest child. The grandmother testified that the child's name "[is] different. It's unusual. It's kind of stupid, but it's kind of cute." The trial court did not think so. Neither did the Court of Appeals. The appellate court reprinted the following verbatim from the transcript before the trial court.

---

[25]This 1969 hit by Cash was actually written by the popular poet Shel Silverstein.

[26]Tenaga's one-hit wonder was released in 1966.

[27]The film was released in 1970.

Court: I simply do not understand why you named this child–his legal name is Weather'by Dot Com Chanel Fourcast Sheppard. Now, before you answer that, Mr. [Speir], the plaintiff in this action, is a weatherman for a local television station.

Sheppard: Yes.

Court: Okay. Is that why you named this child the name that you gave the child?

Sheppard: It...it stems from a lot of things.

Court: Okay. Tell me what they are.

Sheppard: Weather'by–I've always heard of "Weatherby" as a last name and never a first name, so I though Weatherby would be–and I'm sure you could spell it b-e-e or b-e-a or b-y. Anyway, Weatherby.

Court: Where did you get "Dot Com"?

Sheppard: Well, when I worked at NBC, I worked on a Teleprompter computer.

Court: All right.

Sheppard: All right, and so that's where the "Dot Com" [came from]. I just thought it was kind of cute, Dot Com, and then instead of–I really didn't have a whole lot of names because I had nothing to work with. I don't know family names. I don't know any names of the Speir family, and I really had nothing to work with, and I thought "Chanel"? No, that's stupid. And I though "Shanel"? I've heard of a black little girl named Shanel.

Court: Well, where did you get "Fourcast"?

Sheppard: Fourcast? Instead of F-o-r-e, like your future forecast or you weather forecast, F-o-u, as in my fourth son, my fourth child, Fourcast. It was–

Court: So his name is "Fourcast"? F-o-u-r-c-a-s-t?

Sheppard: Yes...

Court: All right. Now, do you have some objection to him being renamed Samuel?

Sheppard: Yes.

Court: Why? You think it's better for his name to be Weather'by Dot Com Chanel–

Sheppard: Well, the–

Court: Just a minute for the record.

Sheppard: Sorry.

Court: –Chanel Fourcast, spelled F-o-u-r-c-a-s-t? And in response to that question, I want you to think about what he's going to be–what his life is going to be like when he enters the first grade and has to fill out all [the] paperwork where you fill out–this little kid fills out his last name and his first name and his middle name, okay? So I just want–if your answer to that is yes, you think his name is better today than it would be with Samuel Charles, as his father would like to name him, and why. Go ahead.

Sheppard: Yes, I think it's better this way.

Court: The way he is now?

Sheppard: Yes. He doesn't have to use "Dot Com." I mean, as a grown man, he can use whatever he wants.

Court: As a grown man, what is his middle name? Dot Com Chanel Fourcast?

Sheppard: He can use Chanel. He can use the letter "C."

Court: And when he gives his Birth Certificate–is it on his Birth Certificate as you've stated to the Court? Does his Birth–does this child's Birth Certificate read "Weather'by Dot Com"–

Sheppard: That's how I filled out the paperwork for his–

Court: –Chanel Fourcast"?

Sheppard: Yes, and for his Social Security card, I filled it out as Weather'by F. Sheppard.

Court: All right.

On appeal, Sheppard complained that the trial court's decision to change the child's name was not in the child's best interest. She complained the trial court "focused almost exclusively" on the potential embarrassment the name would cause the child. The appellate court observed the trial court considered a number of factors, including Sheppard's confused marital state. The trial court noted that Sheppard testified she had been married to a man named Braun, but she stayed but one night with him before he left for Florida. She later divorced Braun and married "Robert Lee Skaggs, but ... Robert Lee Skaggs was really Merle Eric Hudson III." When asked if she were still married

to Skaggs/Hudson, she replied, "I physically didn't take Robert Lee Skaggs into matrimony. I physically wasn't holding his hand, and he didn't put a ring on my finger. Merle Eric Hudson III did." She told the court she wasn't sure if she were still married or not to Skaggs/Hudson. The court lamented that "I can't tell you what Ms. Sheppard's last name is, but I can tell you that the father of the child, Mr. [Robert] Speir, has always been known as Mr. [Robert] Speir." Sheppard has "been married to at least two people, and perhaps three."

The appellate court decided to quote extensively from the trial court's findings.

> The level of community respect associated with the proposed surname of Mr. Speir, I think the evidence is clear that there's nothing to indicate to the court that there's any sort of disrespect or problems associated with his surname, and Ms. Sheppard, by her own volition, in this community has been arrested so many times that I think it's in the best interests of the child to change his name to Speir.
>
> Of course, the difficulties, harassment, and embarrassment of the child makes sense from bearing the present proposed name (Weather'by Dot Com Chanel Fourcast Sheppard). I asked Ms. Sheppard about his name, and she stated to the court, "He doesn't have to go to [sic] use dot com. I mean as a grown man, he can use whatever he wants. He can use Chanel," which she stated was after the perfume, or he could use the letter C. She stated that she filled out his social security card as Weather'by F. Sheppard, so I think by her own admission by stating that she perceives problems with the child regarding his embarrassment–and this also goes to the existence of her parental misconduct regarding giving him that name–I think she anticipated that the child might suffer from embarrassment, and that's why she suggested to the court that she had already used the name "F. Sheppard" on his social security card and that he doesn't have to use "dot com" when he's in the first grade trying to fill out his papers as to what his name is.

After this lengthy recitation in the trial court's own words, the Court of Appeals merely stated "we hold that the trial court did not err in determining that it was in the child's best interest to change his name."

"What's in a name?" Juliet asked, perhaps rhetorically.[28] Now we know.

QUOTABLE . . .

> Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people.

---

[28]*Romeo and Juliet*, Act II, Scene ii (William Shakespeare).

North Carolina Supreme Court Chief Justice James G. Exum, Jr. in Waddle *et al.* v. Sparks *et al.*, 414 S.E.2d 22, 27 (N.C. 1992), quoting *Restatement (Second) of Torts § 46, comment (j)* (1965).

Date: _____

_____
Kevin C. McDowell, General Counsel
Indiana Department of Education

The **Quarterly Report** and other publications of the Legal Section of the Indiana Department of Education can be found on-line at <www.doe.state.in.us/legal/>.

Policy Notification Statement

It is the policy of the Indiana Department of Education not to discriminate on the basis of race, color, religion, sex, national origin, age, or disability, in its programs, activities, or employment policies as required by the Indiana Civil Rights Law (I.C. § 22-9-1), Title VI and VII (Civil Rights Act of 1964), the Equal Pay Act of 1973, Title IX (Educational Amendments), Section 504 (Rehabilitation Act of 1973), and the Americans with Disabilities Act (42 U.S.C.§ 12101, *et seq*.).

Inquiries regarding compliance by the Indiana Department of Education with Title IX and other civil rights laws may be directed to the Human Resources Director, Indiana Department of Education, Room 229, State House, Indianapolis, IN 46204-2798, or by telephone to 317-232-6610, or the Director of the Office for Civil Rights, U.S. Department of Education, 111 North Canal Street, Suite 1053, Chicago, IL 60606-7204

Index for Quarterly Report
Through October – December: 2004

Legend

J-M (January-March) J-S (July-September)
A-J (April-June) O-D (October-December)